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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NBCUNIVERSAL MEDIA, LLC,
UNIVERSAL NETWORK
TELEVISION, LLC,
OPEN 4 BUSINESS
PRODUCTIONS LLC,
NBC SUBSIDIARY (KNBC-TV)
LLC,
TELEMUNDO NETWORK
GROUP LLC,
WNJU-TV BROADCASTING LLC,
AMERICAN BROADCASTING
COMPANIES, INC.,
ABC HOLDING COMPANY INC.,
DISNEY ENTERPRISES, INC.,
CBS BROADCASTING INC.,
CBS STUDIOS INC., and
BIG TICKET TELEVISION, INC.,

Plaintiffs,

v.

BARRY DRILLER, INC.,
BARRYDRILLER CONTENT
SYSTEMS PLC, AEREOKILLER
LLC, and JOHN DOES 1-10,

Defendants.

CASE NO. CV12-06950-GW (xE)

**DEFENDANT AEREOKILLER LLC'S
OPPOSITION TO PLAINTIFFS'
APPLICATION FOR PRELIMINARY
INJUNCTION; SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: December 6, 2012

Time: 8:30 a.m.

Judge: Hon. George H. Wu

Place: Courtroom 10 – Spring Street
Courthouse

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF FACTS	3
A. Aereokiller’s Technology Does Not Infringe Any of the Plaintiffs’ Copyrighted Works	3
B. None of the Issues Litigated and Resolved By the Prior Action Between FilmOn and the Networks Are At Issue Here	6
C. Defendants Have Not “Waived” Their Technology Defense in Expedited Discovery	8
ARGUMENT	11
I. PLAINTIFFS CANNOT ESTABLISH THE ELEMENTS REQUIRED FOR ISSUANCE OF A PRELIMINARY INJUNCTION	11
II. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS	12
A. Aereokiller’s Technology Assists Consumers in the Lawful Exercise of their Right to Remotely Time-Shift And Play-Back Over the Air Broadcast Programming	12
B. Aereokiller Does Not Provide or Engage in a “Public Performance” under the Copyright Act	14
III. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM	19
A. Irreparable Harm is No Longer Presumed	19
B. Plaintiffs’ Showing is Speculative, and Any Actual Harm Can be Remediated with Money Damages	19
C. Plaintiffs Misstate the History of Their Dispute with FilmOn and Aereokiller in a Failed Attempt to Bolster Their Weak Irreparable Harm Arguments	20
D. The Risk of Wrongful Enjoinment Justifies a Substantial Bond	23
IV. THE BALANCE OF HARDSHIPS FAVORS DEFENDANTS	23
V. PUBLIC INTEREST DOES NOT SUPPORT ISSUANCE OF INJUNCTIVE RELIEF	24
CONCLUSION	25

TABLE OF AUTHORITIES**Page(s)****FEDERAL CASES**

<i>ABC v. Aereo</i> , 2012 WL 2848158 (S.D.N.Y. July 11, 2012).....	passim
<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F. 3d 1127 (9 th Cir. 2011)	11
<i>Aurora World, Inc. v. Ty, Inc.</i> , 719 F. Supp. 2d 1115 (C.D. Cal. 2009).....	24
<i>Cal. Pharmacist’s Ass’n v. Maxwell-Jolly</i> , 563 F. 3d 847 (9 th Cir. 2009).....	20
<i>California Dairies, Inc. v. RSUI Indemnity Co.</i> , 2010 WL 2598376 (E.D. Cal. 2010).....	22
<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F. 3d 121 (2d Cir. 2008) (“ <i>Cablevision</i> ”).....	passim
<i>Delphon Industries, LLC v. Int’l Test Solutions Inc.</i> , 2011 WL 4915792 (N.D. Cal. Oct 17, 2011)	20
<i>Ebay, Inc. v. Bidder’s Edge</i> , 100 F. Supp. 2d 1058 (N.D. Cal. 2000)	20
<i>Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.</i> , 654 F. 3d 989 (9 th Cir. 2011).....	3
<i>Instantcert.com, LLC v. Advanced Online Learning, LLC</i> , 2012 WL 3689498 (D. Nev. Aug. 27, 2012)	20
<i>International Jensen, Inc. v. Metrosound U.S.A., Inc.</i> , 4 F. 3d 819 (9 th Cir. 1993)	23
<i>Live Nation Motor Sports, Inc. v. Davis</i> , 2007 WL 79311 (N.D. Tex. Jan. 9, 2007)	18
<i>Lydo Enter, Inc. v. City of Las Vegas</i> , 745 F. 2d 1211 (9 th Cir. 1984)	20

1	<i>MAI Systems Corp v. Peak Computer, Inc.</i> ,	
2	991 F. 2d 511 (9th Cir. 1993)	13
3	<i>Mazurek v. Armstrong</i> ,	
4	520 U.S. 968 (1997)	11
5	<i>Nintendo of America v. Lewis Galoob Toys, Inc.</i> ,	
6	16 F. 3d 1032 (9 th Cir. 1994)	23
7	<i>On Command Video Corp v. Columbia Pictures Industries</i> ,	
8	777 F. Supp. 787 (N.D. Cal. 1991)	17, 18
9	<i>Random House v. Rosetta Books LLC</i> ,	
10	283 F. 3d 490 (2d Cir. 2002)	23
11	<i>Religious Technology Ctr v. Netcom On-Line Comm. Svcs, Inc.</i>	
12	907 F. Supp. 1361 (N.D. Cal. 1995) (“Netcom”)	2, 12, 13, 18
13	<i>Robert Trent Jones II, Inc. v. GFSI, Inc.</i> ,	
14	537 F.Supp.2d 1061 (N.D. Cal. 2008)	19, 20
15	<i>Seed Services, Inc. v. Winsor Grain, Inc.</i> ,	
16	2012 WL 1232320 (E.D. Cal. 2012)	19
17	<i>Sionix Corp. v. Moorehead</i> ,	
18	299 F. Supp. 2d 1082 (S.D. Cal. 2003)	23
19	<i>Softman Prods. Co., LLC v. Adobe Systems, Inc.</i> ,	
20	171 F. Supp. 2d 1075 (C.D. Cal. 2001)	19, 25
21	<i>Sony Corp. of America v. Universal Studios, Inc.</i> ,	
22	464 U.S. 417 (1984) (“Sony”)	1, 12, 17, 18
23	<i>Twentieth Century Fox Film Corp. v. iCraveTV</i> ,	
24	2000 WL 255989 (W.D. Pa. Feb. 8, 2000)	9, 10, 19
25	<i>Video Pipeline, Inc. v. Buena Vista Home Ent. Inc.</i> ,	
26	192 F. Supp. 2d 321 (D. N.J. 2002)	19
27	<i>Warner Bros Ent. Inc. v. WTV Systems, Inc.</i> ,	
28	824 F. Supp. 2d 1003 (C.D. Cal. 2011)	17, 18
	<i>Winter v. NRDC</i> ,	
	555 U.S. 7 (2008)	11

1	<i>WPIX, Inc. v. ivi, Inc.</i> ,	
2	691 F. 3d 275 (2 nd Cir. 2012).....	18
3	FEDERAL STATUTES	
4	17 U.S.C. § 106(4).....	14
5	OTHER AUTHORITIES	
6	Copyright Act, Section 111	6
7	Copyright Act, Section 106(1)-(5).....	8
8		
9		
10		
11		
12		
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case is the latest battle in an ongoing dispute between various television internet companies and the four major networks – Fox, NBC, CBS and ABC (“the Networks”) – over the legality of new technology which allows consumers to individually tune in to free, over-the-air broadcast television and watch it on their computers instead of on their televisions, using an internet connection. In the first case to test technology similar to Defendant Aereokiller’s technology, remote, mini antenna and digital video recorder (“DVR”) technology was endorsed as legally valid by the Southern District of New York earlier this year. *See ABC v. Aereo*, 2012 WL 2848158 (S.D.N.Y. July 11, 2012). Though Aereokiller’s technology differs from Aereo’s in important ways that make it better and more legally defensible than Aereo’s, the two are similar in that both utilize digital antenna and DVR technology that has been used in consumer homes for years by users to tune in to free over-the-air television and record it to watch later.

Aereokiller allows users to rent their own dedicated mini antenna (the “static” option) or agree to use one of many currently available mini antennas at any given time (the “dynamic” option). However, at all times, each user tunes in with their own independently operational mini antenna and tuner, and each user transmits and saves the television content to his or her own device, through the use of a dedicated storage space. In other words, unlike prior streaming content found by some courts to constitute a public rebroadcast of copyrighted works, the mini antenna technology is merely a user-directed private viewing of already available, free over-the-air television content using the same antenna and tuner technology employed by consumers for years.

By providing *individualized* network programming to customers through dynamically allocated mini antennas, which data the user fully controls via computer, Aereokiller complies with the current state of law as set forth in the leading decisions

1 of *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), (“*Sony*”),
 2 and *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121 (2d Cir. 2008),
 3 (“*Cablevision*”); cf. *Religious Technology Ctr v. Netcom On-Line Comm. Svcs, Inc.*
 4 907 F. Supp. 1361 (N.D. Cal. 1995), (“*Netcom*”).

5 In an apparent attempt to bolster what is an otherwise weak irreparable harm
 6 argument against Aereokiller, the Networks misstate the history of their various
 7 litigation battles with Aereokiller’s technology partner, FilmOn.com, Inc.
 8 (“FilmOn”), and FilmOn’s CEO, Alki David. The Networks claim that the service
 9 they seek to enjoin in this case is a mere “reincarnation” of the service which FilmOn
 10 was previously restrained from employing in a separate New York action, Case. No.
 11 10-CV-7532-NRB, in front of the Honorable Naomi Reice Buchwald (the “New York
 12 Action”), and that Aereokiller is just a ploy by Mr. David to violate, in a superficially
 13 new way, a prior temporary restraining order in the New York Action, which became
 14 permanent by way of the settlement of that action (the “New York Settlement”).
 15 The *full* history of that dispute includes the following events: (1) on November 2010,
 16 Judge Buchwald issued a temporary restraining order enjoining FilmOn from
 17 streaming Network content with its then-current technology, which *did not* employ
 18 separate mini antennas, tuners and storage space as Aereokiller does; (2) on July 11,
 19 2012, while the New York Action was being settled, the *Aereo* Decision came out
 20 and Mr. David issued a press release stating FilmOn’s intent to license new
 21 technology based upon “mini antenna” technology like that of Aereo; (3) on August
 22 1, 2012, the Networks executed the New York Settlement with the exact same
 23 language as the November 2010 restraining order, making no mention of any mini
 24 antenna technology; (4) on August 3, 2012, Mr. David sent an email to the head
 25 lawyer for the Networks attaching a photograph of a mini antenna farm now used by
 26 Aereokiller explaining why it was non-infringing, yet still informing the Networks of
 27 his companies’ intention to pay the Networks a fair license fee for their (just as
 28 FilmOn had offered to do all along). In response, rather than attempt to enforce the

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New York Settlement in that court, the Networks filed this new lawsuit against Aereokiller on August 10, 2012. They have never made any effort in the New York Action to enjoin the Aereokiller technology that they claim is merely a “reincarnation” of the services enjoined in that case.

Plaintiffs cannot establish any of the required elements of their claims. First, as noted above, because the technology Plaintiffs seek to enjoin is legal under the reasoning and ruling of the *Aereo* Decision (and several others upon which it is based), Plaintiffs cannot show a likelihood of success on the merits. Second, while Plaintiffs make a spirited and lengthy argument regarding irreparable injury, they cannot surmount the reality that monetary damages will be sufficient to remedy any harm proven at trial. For that reason, irreparable injury is not presumed. *See, e.g., Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F. 3d 989 (9th Cir. 2011). In addition, the balance of hardships and the public interest favor denying this injunction and allowing Aereokiller’s nascent competing business to continue to exist. As long as Aereokiller is allowed to develop and deploy its innovative core technology, which is identical in relevant aspects to Aereo’s, there is no concern that Aereokiller will be unable to satisfy any monetary damage award related to any potential infringement.

Denying the Networks’ motions for preliminary injunction would merely further the long-standing public interest in allowing consumers to freely view the content of Networks which were granted broad, exclusive rights to certain over-the-air spectrums.

For all of these reasons, Plaintiffs’ motion for preliminary injunction should be denied.

STATEMENT OF FACTS

A. Aereokiller’s Technology Does Not Infringe Any of the Plaintiffs’ Copyrighted Works

Aereokiller’s technology is based on mini antennas that, along with routers, servers, adapters, tuners and transcoders and other equipment, receives (among other

things) “free-to-air” broadcast television programming, encodes that programming into formats suitable for Internet distribution and then distributes the programming worldwide over the Internet. (*See* Declaration of Alkiviades David (“David Decl.”) ¶¶ 6, 8; Declaration of Mykola Kutovyy (“Kutovyy Decl.”) ¶ 7.)

The technology is user-friendly and by design allows the user to control the viewing experience at all times. The user starts a viewing session by opening an authorized “client application,” including software like the HDi Player, a website like filmonx.com (which is reserved for use by Aereokiller), or a proprietary mobile phone application like the FilmonTVPlus application for Apple’s iOS or LiveTV application for Android. (David Decl. ¶ 9; Kutovyy Decl. ¶ 32.) The client applications displays a variety of programming options, including (in the past) local broadcast channels. When the customer clicks on any local channel, it requests a unique, dedicated video stream from Filmon.com. (Kutovyy Decl. ¶ 33.) The client application then shows a message such as “Connecting antenna” while Aereokiller’s web service issues a unique antenna stream and tunes the channel frequency. (*Id.*) While this process takes place, the customer sees the message “We are connecting your antenna.” (*Id.* ¶ 34.) After the connection is established, the user can is able to view the selected programming.

The technology underlying the user experience is more complicated, and required a substantial investment of time and resources to design and test. (David Decl. ¶¶ 15, 19-24, 32.) The system is comprised of numerous parts which function together holistically. At the core of the design are mini antennas, each no larger than the size of a dime and spaced about six (6) inches apart on a board. (Kutovyy Decl. ¶ 8.) These antennas are either privately owned by individual users (the “static option”) or dynamically allocated (assigned to specific individual users for a period of time, ensuring only one user is assigned to a given antenna at a time). (*Id.* ¶¶ 9-10.) Next, the tuner server connects the mini antennas to ATSC (“Advanced Television Systems Committee”) adapters to transfer off-air data. (*Id.* ¶ 11.) The

1 encoder server transcodes video/audio data into a format suitable for Internet delivery
 2 and/or a format supported by endpoint devices such as iPhone, iPad, Android, and
 3 STB devices. (*Id.* ¶ 12.) The distribution endpoint is a server or group of servers for
 4 end user data delivery, and the encoder server publishes data to the distribution
 5 endpoint. (*Id.* ¶¶ 13-14.)

6 The technological process of converting television broadcasts to a format that
 7 can be distributed via internet begins when a user initiates a request to a web server
 8 by clicking on a channel using a “client application” such as the filmonx.com website
 9 or applications for mobile devices. (*Id.* ¶ 15.) The web server sends the request for a
 10 specific channel to the antenna router, while a free antenna is selected and tuned to
 11 the selected channel's frequency band. (*Id.* ¶¶ 16-17.) The antenna router processes
 12 the request, finds the first free antenna adapter and then schedules a request to tune
 13 the selected channel. (*Id.* ¶ 18.) The system is designed so that no two users can
 14 select the same antenna at the same time. (*Id.*) Next, the antenna router finds a free
 15 encoder slot and sets up a tuner server to send the data to the free encoder where the
 16 unique directory is created and assigned to the user. (*Id.* ¶ 19.) The system is
 17 designed so that each user has their own unique directory not shared with any other
 18 user. (*Id.*)

19 Once the user's unique directory is created, data is from the antenna is
 20 processed through the tuner server and then the encoder server. (*Id.* ¶ 20.) In this
 21 process, the data is encoded for an internet delivery format, saved to the user's unique
 22 directory (for possible later seek request) and transmitted to the user through the
 23 distribution endpoint. (*Id.*) All saved data is removed when the user disconnects
 24 from the system. (*Id.* ¶ 21.)

25 When the user finishes viewing the channel – with user options to stop, pause,
 26 close application and/or switch channels – the web user interface generates a "stop"
 27 request to the antenna router to stop fetching data and free up the antenna device and
 28 encoder slot. (*Id.* ¶ 29.) The unique directory and files are then removed. (*Id.*)

**B. None of the Issues Litigated and Resolved By the Prior Action
Between FilmOn and the Networks Are At Issue Here**

Plaintiffs argue, “Aereokiller is merely a reincarnation of an unauthorized Internet streaming service ... which has been enjoined, temporarily and then permanently, since 2010” in the New York Action. But the injunction entered in the New York Action has no bearing or application to Aereokiller’s service because it concerns entirely different technology.

Prior to commencement of the present action, FilmOn operated a different “video on demand” business based on entirely different technology. On or about September 27, 2010, FilmOn began to stream over the Internet content produced and owned by the primary four “free to air” broadcast networks CBS, NBC, Fox and ABC, as well as their respective corporate entities. (David Decl. ¶ 10.) At all times, FilmOn believed it was entitled to stream the network’s programming (at a cost) under Section 111 of the Copyright Act, which allows cable systems to do so after paying a statutory licensing fee. (*Id.* ¶ 11.)¹ FilmOn offered to pay the licensing fees, but the Networks refused to accept them. (*Id.* ¶ 12.)

Instead, the Networks brought the New York Action against FilmOn alleging that its streaming service infringed their various copyrights to television programming. (*Id.* ¶ 13.) The law firm Arnold and Porter, which represents CBS, ABC and NBC in these motions, represented plaintiffs. (*Id.*) During pendency of the action, the NY Plaintiffs applied for and on November 22, 2010 were granted a temporary restraining order preventing FilmOn from “infringing by any means, directly or indirectly, any of plaintiffs’ exclusive rights under [the Copyright Act],

¹ Section 111 of the Copyright Act defines a cable system as “a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs **by wires, cables, microwaves, or other communications channels** to subscribing members of the public who pay for such service.” (emphasis added).

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1 including but not limited to the **streaming** over mobile telephone systems and/or the
 2 Internet of any of the broadcast television programming ...”. (*Id.* ¶ 14.) (Emphasis
 3 added). On December 2, 2010, the Court issued an order that the temporary
 4 restraining order was to remain in place until the Court ruled on Plaintiffs motion for
 5 a preliminary injunction. (*Id.*)

6 FilmOn strenuously disagreed with the Court’s ruling on the temporary
 7 restraining order. However, FilmOn ultimately decided for strategic reasons that its
 8 best interests were to settle the New York Action and re-launch a new kind of video
 9 on demand business based on *Cablevision* and DVR/antenna technology. (*Id.*) (*Id.* ¶
 10 15.) For years prior to the temporary restraining order in the New York Action,
 11 FilmOn had experimented with mini antenna-based technology like the Aereokiller
 12 technology, but it had not decided to deploy it because it would require millions of
 13 dollars in investment to develop and implement this technology. (*Id.*) After the New
 14 York Action was filed, however, and especially after the restraining order, FilmOn
 15 began to seriously develop and prepare to deploy the Aereokiller technology.

16 In June 2012, FilmOn and the Networks engaged in negotiations to settle the
 17 New York Action, led by Hadrian Katz of Arnold and Porter on behalf of the
 18 Networks. (*Id.* ¶ 16.) The Aereo Decision, which FilmOn and the Networks were
 19 eagerly awaiting, came out while the New York Settlement was being negotiated, on
 20 July 11, 2012. That day, FilmOn issued a press release entitled “A Victory for Aereo
 21 is a Victory for FilmOn” which was covered by news outlets such as Reuters. (*Id.* ¶
 22 23, Ex. B.) The press release lauded the district court decision, stating that “While
 23 FilmOn is settling its own dispute with the networks, it is now reinstating its live
 24 major Network streams in the state of New York with principally the same
 25 application of mini antennas as Aereo uses.” (*Id.*) The press release was publicly
 26 available and widely reported. (*Id.*) Despite this news, the Networks made no
 27 change to the language of the New York Settlement Agreement, executing it with the
 28

1 exact same language as the November 2010 restraining order on August 1, 2012.²

2 Two days later, on or about August 3, 2012, FilmOn CEO Alki David sent an
3 electronic message to Hadrian Katz, attaching a photograph of Mr. David holding an
4 antenna in front of an antenna farm. (David Decl., Ex. C.) In the message, he wrote:

5 Please see attached. This is a picture taken from one of several
6 Antenna/DVR locations across the country. Like the Aereo system,
7 FilmOn Air X allows audiences to connect to a unique antenna and tune
8 into over the air signals freely available to them to watch them remotely
9 from a DVR. As we do with the other Content Partners on the
10 FilmOn.com platform, which is different from FilmOn Air X, we will be
11 making regular payments to your clients from all subscribers in the USA
12 We have at this time assumed that \$0.50 Cents per subscription
13 from each channel that is allowed into the system is appropriate. \$0.25
14 Cents to the local affiliate and 25 Cents to the Network. Even though we
15 recognize that FilmOn Air is not a Cable system, we have made these
16 assumptions based on the practices of the Cable industry.

17 (*Id.*) After receiving Mr. David's email, Plaintiffs took no action to enforce the New
18 York Settlement, the Stipulated Consent Judgment attached to it, or the permanent
19 injunction in the Southern District of New York (which was the exclusive place of
20 jurisdiction for enforcing these instruments). They still have not.

21 **C. Defendants Have Not "Waived" Any Defense**

22 Plaintiffs assert that Defendants "cannot assert an 'Aereo' defense (on which it
23 bears the burden of proof) while withholding the technical discovery necessary to test
24

25 ² The Stipulated Consent Judgment and Permanent Injunction explicitly references the
26 November 22, 2010 temporary restraining order entered by Judge Buchwald and
27 indeed adopts word-for-word the terms of that order in the permanent injunction
28 entered in that case: "[Defendants] ... are hereby enjoined from infringing, by any
means, directly or indirectly, any of plaintiff's exclusive rights under Section 106(1)-
(5) of the Copyright Act, including but not limited to through the streaming over
mobile telephone systems and/or the Internet of any of the broadcast television
programming in which Plaintiff owns a copyright." (David Decl. Ex. A.)

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1 that defense.” See 11/8/12 Memo of P&A’s at 3. This misconstrues Federal civil
 2 procedure, the procedural history of these actions, as well as the Court’s rulings on
 3 Plaintiffs’ motions for expedited discovery.

4 Plaintiffs commenced these actions the second week of August 2012. (See
 5 Declaration of Ryan G. Baker (“Baker Decl.”), ¶¶ 5-6.) On August 27, 2012 (in the
 6 *Fox* action) and August 28, 2012 (in the *NBC* action), the parties stipulated to a
 7 briefing schedule for Plaintiffs’ motions to conduct preliminary discovery necessary
 8 to support their contemplated motions for preliminary injunction. (*Id.* ¶ 9.) Prior to
 9 the hearing of those motions, counsel for the parties met and conferred in an attempt
 10 to reach a resolution of the issues raised in Plaintiffs’ motions. (*Id.* ¶¶ 10-11.) As a
 11 result of those discussions, the parties agreed to a schedule for limited discovery. Of
 12 course, the parties agreed at that time to adhere to the Federal Rules of Civil
 13 Procedure pertaining to discovery, and counsel for Defendant specifically stated that
 14 Defendant reserved the right to object to any of Plaintiffs’ preliminary discovery
 15 requests. Following that agreement between the parties, the Court issued its tentative
 16 ruling on Plaintiffs’ motions. In those rulings, the Court considered and expressly
 17 rejected Plaintiffs’ arguments that they are entitled to discovery on Aereokiller’s
 18 technology at this stage of the litigation. Specifically, the Court wrote:

19 Plaintiffs argue that they should be given the opportunity to obtain
 20 expedited discovery of the rest of the information they seek because
 21 of what they anticipate defendants (or at least Aereokiller – the rest of
 22 the defendants not having been served yet) will argue in response to
 23 Plaintiffs’ *anticipated* preliminary injunction motion, based on the
 24 outcome of a preliminary injunction motion in a recent Southern
 25 District of New York case *ABC v. Aereo*, 2012 U.S. Dist. LEXIS
 26 96309 (S.D.N.Y. July 11, 2012). For the Court to determine it is
 27 appropriate to grant such early discovery on these topics, it would
 28 have to determine that they were necessary (and sufficiently narrowly

1 tailored) because of the nature of defendants' Aereokiller's *actual*
 2 opposition *and* that such an opposition had a colorable chance of
 3 convincing the Court of its merit on the face of the unauthorized
 4 conduct that gave rise to this litigation. Unless both of these events
 5 come to pass there is no reason why Plaintiffs should be able to
 6 achieve by way of expedited discovery what they would otherwise
 7 have to wait for in connection with their Rule 26(f) conference.
 8 (*Id.* ¶¶ 12-13, Ex. B at 2) (emphasis in original) (9/13/12 tentative ruling in *Fox* action,
 9 adopted as final).

10 In its responses and objections to Plaintiffs' preliminary discovery requests,
 11 Defendant objected to the production of documents regarding technology and to
 12 testimony on that subject. (*Id.* ¶ 14, Ex. D.) In addition to those requests being
 13 premature at that stage of the litigation (which was explicit in the Court's ruling),
 14 Plaintiffs' requests were poorly formed such that Defendant could not have possibly
 15 answered them in the allotted time.

16 Although not designated for that purpose, Mr. David offered some testimony at
 17 his deposition regarding technology. (Declaration of Jaime W. Marquart ("Marquart
 18 Decl.") ¶ 2.) Although Mr. David was willing to answer many questions related to
 19 the technology of the Aereokiller service, his testimony was limited to protect
 20 Aereokiller trade secrets, such as the exact location of its antenna farms and the
 21 identity of its prospective business partners. (*Id.* ¶ 4.) Plaintiffs' expert, Nigel Jones,
 22 also attended Mr. David's deposition. (*Id.* ¶ 6.) The time frame for expedited
 23 discovery in these actions was accelerated, by Plaintiffs' terms and urging. In
 24 contrast to the rushed process here, in the *Aereo* litigation in the Southern District of
 25 New York (with a similar request for expedited discovery made by plaintiffs in that
 26 action), it took several months for briefing, fact discovery, expert discovery and an
 27 evidentiary hearing. (*See* Request for Judicial Notice ("RJN"), Ex. A (3/26/12
 28 Scheduling Order).)

1 Finally, as noted in the Declaration of Ryan Baker filed herewith, Aereokiller
 2 is willing to permit a site visit to one of the datacenters, from which Aereokiller
 3 operates its remote antennas; however, given the briefing schedule on Plaintiffs'
 4 motions, it is unlikely the site visit will occur prior to the hearing of Plaintiffs'
 5 motions.

6 ARGUMENT

7 **I. PLAINTIFFS CANNOT ESTABLISH THE ELEMENTS REQUIRED** 8 **FOR ISSUANCE OF A PRELIMINARY INJUNCTION**

9 A preliminary injunction is “an extraordinary and drastic remedy, one that
 10 should not be granted unless the movant, by a *clear showing*, carries the burden of
 11 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original).
 12 A plaintiff seeking a preliminary injunction bears the burden of showing “that he is
 13 likely to succeed on the merits that he is likely to suffer irreparable harm, that the
 14 balance of equities tips in his favor, and that an injunction is in the public interest.”
 15 *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Injunctive relief should be denied where
 16 plaintiff fails to carry this burden with respect to any of these factors. *See, e.g., id.* In
 17 light of the Supreme Court’s decision in *Winters*, the Ninth Circuit now requires a
 18 demonstration of each of those four factors for an injunction to issue. *See, e.g.,*
 19 *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1131-32 (9th Cir. 2011)
 20 (“For the reasons that follow, we hold that the ‘serious questions’ approach survives
 21 *Winter* when applied as part of the four-element *Winters* test”).

22 Here, Plaintiffs cannot establish any of the elements necessary for a
 23 preliminary injunction to issue:

- 24 • Plaintiffs are not likely to succeed on the merits because Aereokiller’s
 25 service does not infringe Plaintiff’s copyrights;
- 26 • Plaintiff’s lengthy “parade of horrors” irreparable injury arguments
 27 depend on the incorrect assumption they are likely to prevail on the
 28 merits and money damages are sufficient here to remedy any harm to

1 Plaintiffs;

- 2 • The balance of hardships tilts decidedly in favor of Aereokiller as
- 3 wrongful enjoinder would irreparably injure its nascent business; and
- 4 • Injunctive relief is decidedly *not* in the public interest as reduced access
- 5 to material that Congress has decided ought to be freely available to the
- 6 public is as a matter of logic *against* the public interest.

7 For a preliminary injunction to issue in this case, Plaintiffs must establish each of
 8 those four elements. Unable to establish any of them, Plaintiffs' motions should be
 9 denied.

10 **II. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS**
 11 **ON THE MERITS**

12 Plaintiffs are unlikely to succeed on the merits of their claim for copyright
 13 infringement because: (1) Aereokiller's technology does not enable infringement but
 14 simply assists consumers in the lawful exercise of their right to remotely time-shift
 15 over-the-air broadcasts; and (2) Aereokiller's retransmission of over-the-air broadcast
 16 content does not constitute a "public performance" of copyrighted works.

17 **A. Aereokiller's Technology Assists Consumers in the Lawful Exercise**
 18 **of their Right to Remotely Time-Shift And Play-Back Over the Air**
 19 **Broadcast Programming**

20 The right of individuals to use a technology to record over-the-air broadcasts as
 21 a matter of personal convenience is a long-standing and fundamental principle of
 22 modern copyright jurisprudence. 464 U.S. 417 at 454-56. In *Sony*, the Supreme
 23 Court held that Sony was **not liable** for secondary infringement for sales of a video
 24 recorder, the Betamax, because consumer recording and play-back of television
 25 programs was a form of "fair use" and, therefore, did not violate the Copyright Act.
 26 *Id* at 455. Here, Aereokiller's technology performs exactly the same function: it
 27 allows the consumer to record and play-back broadcast programming through the
 28 convenient medium of the internet, and is therefore functionally (and legally)

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1 analogous to the *Sony* Betamax video recorders.

2 Plaintiffs' brief overlooks the influential Ninth Circuit decision of *Religious*
 3 *Technology Ctr v. Netcom On-Line Comm. Svcs, Inc.* 907 F. Supp. 1361 (N.D. Cal.
 4 1995), which found that an internet access provider was not directly liable for
 5 copyright infringement due to making and storing copies of copyrighted material on a
 6 computer bulletin board service ("BBS"). On that basis, the Court denied plaintiff's
 7 motion for summary judgment. *Id.* The essential technology offered by Netcom was
 8 undisputed... Netcom permitted public posting on the BBS which operated through a
 9 server for public access to that content. The *Netcom* Court noted that "[u]nlike some
 10 other large on-line service providers, such as CompuServe, America Online and
 11 Prodigy, Netcom does not create or control the content of the information available to
 12 its subscribers. It also does not monitor messages as they are posted." *Id.* at 1367-68.
 13 Finding that "copies" were made under the precedent of *MAI Systems Corp v. Peak*
 14 *Computer, Inc.*, 991 F. 2d 511 (9th Cir. 1993), the court distinguished the negative
 15 holding of that case because "Netcom's actions, to the extent they created a copy of
 16 plaintiffs' works were necessary to have a working system for transmitting Usenet
 17 postings to and from the internet. Unlike the defendants in *MAI*, neither Netcom nor
 18 [individual defendant] Klemesrud initiated copying." **The defendants in *MAI***
 19 **turned on their customer's computers thereby creating temporary copies of the**
 20 **operating system, whereas Netcom and Klemesrud's systems can operate**
 21 **without any human interaction."** *Id.* at 1368-69 (emphasis added).

22 Here, Aereokiller's technology also operates without human interaction; it is
 23 triggered by the initiating commands of the consumer to start recording of broadcast
 24 programming that otherwise is freely available to the public. (*See* Kutovyy Decl. ¶¶
 25 15, 32-33.) The factual background here is parallel to that considered by the Southern
 26 District earlier this year, analogizing Aereo's service to a "remote DVR" at least from
 27 the user's perspective. 2012 WL 2848158 at *2. To summarize the relevant
 28 technology, Aereokiller maintains drives that access unique directories created by the

client's initiation. (*Id.* ¶¶ 15, 19-20, 32-33.) Then remote antennas are tuned or pre-tuned to select channels and data is trans coded for the user using an antenna and directory solely dedicated to that user. (*Id.*) Customers also have the ability to stop or pause programming, as well as to close the application or switch channels. (*Id.* ¶ 29.)

B. Aereokiller Does Not Provide or Engage in a “Public Performance” under the Copyright Act

The Copyright Act gives content owners the exclusive right to “perform the copyrighted works publicly.” 17 U.S.C. Section 106(4). In relevant part, the statute provides:

[t]o perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.

Id. Plaintiffs argue at length that Defendants should be enjoined because Defendants are retransmitting Plaintiffs’ programming to the public over the Internet without the copyright holders’ permission, thereby violating Plaintiffs’ public performance rights. Plaintiffs’ argument, however, ignores the particular technological architecture of Aereokiller’s service that *by design* focuses on individual user choice and decision to deliver programming to users and therefore does not constitute a “public” performance of any copyrighted work.

Aereokiller’s technology is similar in relevant legal respects to transmission technologies found by the Second Circuit **not** to constitute public performances for purposes of the Copyright Act. For example, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121 (2d Cir. 2008) (“*Cablevision*”), involved a “Remote Storage DVR” (“RS-DVR”) system designed to allow customers who did not have a stand-alone DVR in their homes to record cable programming on central hard drives

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1 housed and maintained by Cablevision at a remote location. *Id.* at 125. The Second
 2 Circuit explicitly rejected the district court’s conclusion that the RS-DVR technology
 3 violated the Section 106(4) right of public performance, finding that defendant-
 4 appellant’s “embodiments of copyrighted programs” were not fixed copies and also
 5 were not public performances under the transmit clause. The Court’s decision
 6 depended on the RS-DVR’s particular technological architecture and emphasis on
 7 individual viewer use and control: “And because the RS-DVR system, as designed,
 8 only makes transmissions to one subscriber using a copy made by that subscriber we
 9 believe that the universe of people capable of receiving an RS-DVR transmission is
 10 the single subscriber whose self-made copy is used to create that transmission.” *Id.* at
 11 137. Such a technological system enables the **private** transmission of content, not
 12 the public performance of a work under the Copyright Act:

13 [T]he transmit clause directs us to identify the potential audience of a given
 14 transmission, i.e. the persons ‘capable of receiving’ it, to determine whether
 15 that transmission is made ‘to the public.’ Because each RS-DVR playback
 16 transmission is made to a single subscriber using a single unique copy
 17 produced by that subscriber, we conclude that such transmissions are not public
 18 performances ‘to the public,’ and therefore do not infringe any exclusive right
 19 of public performance.

20 *Id.* at 139.

21 A recent Southern District of New York case re-affirmed the continued vitality
 22 of the Cablevision decision in the second circuit, this time specifically with respect to
 23 remote mini antenna and remote DVR technology like that at issue here. In *American*
 24 *Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012 WL 2848158 (S.D.N.Y. 2012)
 25 (“*Aereo*”), involved a technology that allows users to access “free, over-the-air
 26 broadcast television through antennas and hard disks located at Aereo’s facilities.”
 27 *Id.* at *2. From a viewer’s perspective, “Aereo’s system is similar in operation to that
 28 of a digital video recorder ... particularly a remotely located DVR, although Aereo

1 users access their programming over the Internet rather than through a cable
 2 connection. One further difference is that Aereo allows users to view programming
 3 on their computers, laptops, or mobile devices, whereas to view to watch television
 4 on these devices using a standard DVR, users might need to purchase an additional
 5 device like a Slingbox.” *Id.* Ultimately, the Second Circuit found that “Aereo’s
 6 system is materially identical to that in *Cablevision*, suggesting that the copies that
 7 Aereo creates are as significant as those created in *Cablevision*.” *Id.* at *11. As in
 8 *Cablevision*, the *Aereo* court found that Aereo’s technology did not cause “public
 9 performances” of copyrighted works based on a close analysis of how the
 10 technological worked:

11 First, Aereo’s system creates a unique copy of each television program for each
 12 subscriber who requests to watch that program, saved to a unique directory on
 13 Aereo’s hard disks assigned to that user ... Second, each transmission that
 14 Aereo’s system ultimately makes to a subscriber is from that unique copy ...
 15 third, the transmission of the unique copy is made *solely* to the subscriber who
 16 requested it ... the overall factual similarity of Aereo’s service to *Cablevision*
 17 on these facts suggests that Aereo’s service falls within the core of what
 18 *Cablevision* held lawful.

19 *Id.* at *11 (internal citations omitted). Further, the Court found that “the Aereo
 20 system is a stronger case than *Cablevision* for attaching significance to such copies
 21 because, unlike *Cablevision* in which multiple copies were all created from a *single*
 22 stream of data [internal citations omitted] each copy made by the Aereo system is
 23 created from a *separate* stream of data.” *Id.* at *12 (emphasis in original).

24 Aereokiller’s technology is functionally similar to Aereo’s technology, as set
 25 forth in detail by Mykola Kutovyy (the Chief Technical Officer for licensor FilmOn)
 26 in his Declaration in support of Aereokiller’s Opposition. (See Kutovyy Decl. ¶¶ 7-
 27 35.) Of most importance to this Court in its analysis are the following facts: (1)
 28 Aereokiller’s technology is initiated by the user and based on the use of mini

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1 antennas; (2) whether the user connects statically or dynamically, each user has their
 2 own unique antenna and their own unique directory containing the data that they
 3 selected, *e.g.* television programming converted to viewing over the internet via
 4 computer or mobile device; and (3) each user has the ability to control that data,
 5 including to stop, pause, close the application or switch channels. (*Id.* ¶¶ 7-10, 15,
 6 19-20, 29, 31-35.) The unique and dedicated nature of this technology directly
 7 parallels the technology offered by Aereo and endorsed in the earlier *Sony* and
 8 *Cablevision* decisions.

9 The authorities cited and relied upon by Plaintiff analyzed technically distinct
 10 and/or much simpler technologies than the technologies offered by Aereokiller and
 11 Aereo. One such decision is *Warner Bros Ent. Inc. v. WTV Systems, Inc.*, 824 F.
 12 Supp. 2d 1003 (C.D. Cal. 2011), in which plaintiff owners and producers of
 13 copyrighted motion pictures brought suit against a DVD “rental” service company.
 14 WTV’s service, “Zediva,” utilized hundreds of DVD players installed in cabinets at a
 15 data center which played purchased copies of plaintiffs’ copyrighted works that were
 16 offered to consumers by digital service (from the DVDs located in the data center) via
 17 internet for 14 day-rentals. The DVD players were designated to particular movies or
 18 copyrighted works which were transmitted to consumers one after another every four
 19 hours. In this business model, the consumer had little control over the movies they
 20 received digitally and could not pause, rewind or fast forward while viewing.

21 The *WTV Systems* Court found that defendants transmitted the copyrighted
 22 works even though consumers initiated the process. 824 F. Supp. 2d at 1010 (“As in
 23 *On Command*, the fact that Zediva’s customers initiate the transmission by turning
 24 on their computers and choosing which of Plaintiffs’ Copyrighted Works they wish to
 25 view is immaterial.”). The Court took care, however, to distinguish the facts and its
 26 ruling from those in *Cablevision* because of the unique copy made by consumers in
 27 *Cablevision* as well as the consumer’s ability to control their own unique copy. *Id.* at
 28 1011. The clear implication of the Court’s noting the different facts in *Cablevision* is

1 that the *WTV Systems* Court would have been guided by the *Cablevision* Court's
2 reasoning if presented with those facts, as are presented here.³

3 Another decision heavily relied upon by Plaintiffs is the Second Circuit's
4 decision in *WPIX, Inc. v. ivi, inc.*, 691 F. 3d 275 (2d Cir. 2012). The entire first half
5 of the *ivi* Court's analysis as to likelihood of success was devoted to a "cable system"
6 affirmative defense that is not being asserted by Defendants in this case and,
7 therefore, is wholly inapplicable. 691 F. 3d at 278-84. The irreparable harm
8 arguments accepted by the *ivi* Court are basically reiterated here by Plaintiffs. Yet
9 the key distinction is that the *ivi* irreparable harm facts buttressed a strong showing of
10 likelihood of success based on the unsuccessful assertion of an affirmative defense
11 that has no relevance to this action. Defendants in this action base their defense on
12 the law in *Sony*, *Cablevision*, *Aereo*, *Netcom* and other cases which simply are not
13 addressed by Plaintiffs.

14 Plaintiffs' other authorities all are non-Ninth Circuit lower court rulings based
15 on similarly disparate and distinguishable facts. In *Live Nation Motor Sports, Inc. v.*
16

17 ³ The technology in the distinguishable *WTV* decision is comparable to that in *On*
18 *Command Video Corp v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal.
19 1991), in which the court granted summary judgment for copyright infringement due
20 to electronic delivery of movie videotape signals in hotel rooms that amounted to a
21 "public performance" under the transmit clause. Defendants' system in that case was
22 based on "a computer program, a sophisticated electronic switch, and a bank of video
23 cassette players ('VCP's'), all of which are centrally located in a hotel equipment
24 room." 777 F. Supp 787 at 788. The program directed electronic switches to turn on
25 a particular VCP for any given hotel room that then played the selected movie to the
26 hotel guest based on their selection via remote control. Although the video was
27 viewable only by the guest who ordered it, the *On Command* Court observed that
28 "[t]he viewer cannot pause, rewind or fast-forward the video. When the movie
ends, it is automatically rewound and then immediately available for viewing by
another hotel guest." *Id* (emphasis added). These shared video systems, in *WTV*
Systems and *On Command Video*, differ dramatically from the unique copies made by
consumers of *Aereokiller's* service which are accessible only to the individual
consumer and controlled through actions of the consumer.

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1 *Davis*, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007), the copyright infringement analysis
 2 was based purely on “real time streaming” of live webcasts of car races. *Id.* at *2.
 3 There was no sophistication to the technology that would make the case comparable
 4 to the use of multiple servers, individualized remote mini antennas, and data stored
 5 for each user, as exists in this case. The early decision of *Twentieth Century Fox*
 6 *Film Corp. v. iCraveTV*, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000) was based on
 7 technology that involved entry of any Canadian area code and “clicking to other
 8 buttons.” *Id.* at *2. There were no factual allegations of individual copies made by
 9 consumers and solely accessible to consumers through personally allocated antennas.
 10 Likewise, the technology in *Video Pipeline, Inc. v. Buena Vista Home Ent. Inc.*, 192
 11 F. Supp. 2d 321 (D. N.J. 2002) was streaming of movie trailers that retail customers
 12 accessed “by clicking on the ‘preview’ buttons for a particular motion picture.” *Id.* at
 13 328. Findings of public performance in each of these cases were a more
 14 straightforward matter of analyzing simple replays or rebroadcasts as if in a public
 15 theatre. Defendants’ service, however, creates a “remote DVR” for the consumer’s
 16 convenience in accessing free network programming that is within the consumer’s
 17 rights and control, and that requires no licensing or special permission.

18 **III. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM**

19 **A. Irreparable Harm is No Longer Presumed**

20 Under current law, federal courts do not “assume the existence of irreparable
 21 injury” in copyright actions. *See, e.g., Seed Services, Inc. v. Winsor Grain, Inc.*, 2012
 22 WL 1232320 (E.D. Cal. 2012). Because Plaintiffs are unlikely to prevail on their
 23 Copyright Act claims, Plaintiffs must make an even stronger showing of irreparable
 24 injury, and then Plaintiffs must still meet the two additional factors of the Ninth
 25 Circuits post-*Winters* “alternative test” for granting injunctive relief. *See, e.g.,*
 26 *Robert Trent Jones II, Inc. v. GFSI, Inc.*, 537 F.Supp.2d 1061, 1068 (N.D. Cal. 2008).

27 **B. Plaintiffs’ Showing is Speculative, and Any Actual Harm Can be** 28 **Remediated with Money Damages**

Speculative losses are insufficient to establish actual harm for purposes of irreparable harm analysis. *See, e.g., Softman Prods. Co., LLC v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075, 1090 (C.D. Cal. 2001) (“There must be evidence of actual injury to support claims of ‘irreparable injury.’”). Here, despite offering numerous declarations, Plaintiffs’ showing of irreparable injury is thin at best. There is no specific evidence of imminent harm, aside from pure speculation as to how Defendants’ service may hypothetically impact Plaintiffs’ future ad revenue. Since users transmit the copyrighted works through Defendants’ technology in their original form, there is little basis for arguments regarding inauthenticity or reputational harm.

Furthermore, “[e]conomic damages are not traditionally considered irreparable because the injury can later be remedied by a damage award.” *See Delphon Industries, LLC v. Int’l Test Solutions Inc.*, 2011 WL 4915792 at *3 (N.D. Cal. Oct 17, 2011) (citing *Cal. Pharamcist’s Ass’n v. Mawell-Jolly*, 563 F. 3d 847, 852 (9th Cir. 2009)); *see also Instantcert.com, LLC v. Advanced Online Learning, LLC*, 2012 WL 3689498 (D. Nev. Aug. 27, 2012) (“Showing monetary injuries, without more, will not justify granting a preliminary injunction”) (citing *Lydo Enter, Inc. v. City of Las Vegas*, 745 F. 2d 1211, 1213 (9th Cir. 1984). Here, money damages would be sufficient to redress any harm proven at trial. Lost advertising revenue—if any, should be quantifiable by the time of trial. And if Plaintiffs’ claims bear out over time, Plaintiffs’ current assertions as to reputational harm or lost goodwill (if any) likewise would have some factual support or basis by the time of trial. At present, those assertions are conjecture, not evidence of irreparable harm.

Finally, Plaintiffs’ cases offer no support here. For example, in *Ebay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), plaintiff dismissed its copyright claims and the court based its injunctive relief analysis primarily on the trespass cause of action. *Id.* at 1065-72.

C. Plaintiffs Misstate the History of Their Dispute with FilmOn and Aereokiller in a Failed Attempt to Bolster Their Weak Irreparable

Harm Arguments

Because their irreparable injury arguments are weak, plaintiffs put forth a number of arguments that attempt to paint Aereokiller as a rogue actor lacking respect for judicial process that *deserves* to have its business enjoined. During the course of this assault on Defendants' character, however, Plaintiffs dramatically misstate the true history of their disputes with FilmOn and Aereokiller and ironically evidence their own disdain for judicial process and accurate representation of facts. Specifically, Plaintiffs argue that Aereokiller's technology operates in violation of an existing stipulated consent judgment and permanent injunction related to the New York action between Plaintiffs and FilmOn and, equally absurdly, that Aereokiller has somehow *waived* its right to present a "technology defense" because Aereokiller objected to Plaintiffs' abusive and unreasonable preliminary discovery requests. Both arguments are at odds with the facts.

Aereokiller's technology and the transmission activity at issue in this lawsuit are not subject to any existing court order or injunction and Aereokiller is not a "reincarnation" of FilmOn's old streaming technology. Relatively early on in the prior litigation between the Networks and FilmOn, on November 22, 2010, Judge Buchwald issued a temporary restraining order enjoining FilmOn's internet streaming technology. (David Decl. ¶ 14). The language of the restraining order was transcribed word-for-word in the Settlement Agreement and permanent injunction. (David Decl. Exs. A, D-E). Plaintiffs own actions in this case are logically inconsistent with their claim that Aereokiller's conduct violated either the New York settlement agreement or the Court order in the Southern District of New York. If Plaintiffs really believed Aereokiller violated the Settlement Agreement, Plaintiffs only relief would have been to file an action in the Southern District of New York. (David Decl. Ex. A Section 6.2 ("The Parties expressly agree that the United States District Court for the Southern District of New York shall retain continuing jurisdiction ... and that all actions or proceedings arising in connection with this

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1 Agreement shall be tried and litigated exclusively in the United States District Court
 2 for the Southern District of New York”)(emphasis added)).

3 Without citation to legal authority, Plaintiffs insinuate that Aereokiller’s
 4 alleged discovery “misconduct” waived its right to present a “technology defense” in
 5 this action. Waiver is the intentional relinquishment of a known right after
 6 knowledge of the facts. *California Dairies, Inc.v. RSUI Indemnity Co.*, 2010 WL
 7 2598376 (E.D. Cal. 2010). Here, there is no evidence that Aereokiller waived a right
 8 to present a full defense on the merits, including a defense based on its technological
 9 architecture. In the Court’s ruling on Plaintiffs’ request for preliminary discovery,
 10 the Court denied Plaintiffs’ discovery requests concerning Aerokiller’s technology
 11 because the requests were made prior to Plaintiffs actual request for a preliminary
 12 injunction and Aereokiller’s actual defense. (Baker Decl. Ex. B.) The Court also
 13 noted that, prior to granting discovery on the technology after Plaintiff’s motion for
 14 preliminary injunction, it would also need to determine that the requests were
 15 “sufficiently narrowly tailored” – implicitly recognizing the common-sense
 16 proposition that the normal Federal Rules of Civil Procedure regarding discovery
 17 *always* apply to discovery requests (even preliminary requests). (Id.). Aereokiller
 18 properly objected to discovery requests regarding technology on grounds that they
 19 were premature given the Court’s ruling and also impermissibly overbroad.
 20 (Declaration of Julie Shepard (the “Shepard Decl.”) Ex. N). Instead of pursuing the
 21 normal and appropriate meet and confer procedure and in contrast to the Court’s
 22 preference to conduct technology discovery *after* an actual motion, Plaintiffs sent a
 23 series of record-making correspondence to Aereokiller advancing a invented legal
 24 rule that Defendants *had* to provide technological discovery in response to Plaintiff’s
 25 overbroad requests, because Defendants were able to anticipate the grounds for
 26 Plaintiffs’ preliminary injunction and their likely defenses. *See, e.g.*, (Shepard Decl.
 27 ¶ 20 and Exhibit O). Then, when in the spirit of cooperation, Aereokiller’s 30(b)(6)
 28 representative did provide *some* technological discovery, Plaintiffs accused

Aereokiller of “hiding the ball” because Aereokiller’s representative understandably refused to disclose sensitive, highly confidential information on a topic for which he was not designated. Plaintiffs’ argument is absurd – at all times, Defendants acted to *preserve* their legal rights under federal law and the Court’s order and never knowingly relinquished any rights.

D. The Risk of Wrongful Enjoinment Justifies a Substantial Bond

The Ninth Circuit recognizes that the bond posted for preliminary injunctions may be forfeited if a party is wrongfully enjoined. *Nintendo of America*, 16 F. 3d 1032 (9th Cir. 1994). Here, wrongful enjoinder would deprive Aereokiller of legitimate subscription and advertising revenue at a crucial stage of its growth. Aereokiller also risks losing its substantial technology investment as well as some of its partnerships, and it may also lose key personnel if the injunction issues and the service is put on hold pending the litigation. All of this supports the requirement of a substantial bond to protect Defendants in the event they are wrongfully enjoined in this action. *See, e.g., Sionix Corp. v. Moorehead*, 299 F. Supp. 2d 1082 (S.D. Cal. 2003) (granting motion for recovery from bond)

IV. THE BALANCE OF HARDSHIPS FAVORS DEFENDANTS

Plaintiffs’ alleged harm must be balanced against the harm to Defendants. *See, e.g., International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F. 3d 819, 827 (9th Cir. 1993) (“In evaluating the balance of hardships a court must consider the impact granting or denying a motion for preliminary injunction will have on the respective enterprises”).

Defendants have devoted time and resources to developing the remote antenna-based technology and marketing it to consumers. Moreover, Defendants are not huge multinational entertainment conglomerates like Plaintiff, so have fewer resources to fall back on, comparative to Plaintiffs, if an injunction is issued. Granting of an injunction now could very well cripple Defendants’ business, and, at the very least it sends a strong message to other technology innovators that creativity and novel

1 approaches to facilitate public access to media may be quashed or killed early on
 2 while legal battles ensue against larger players. These facts tip the scales in favor of
 3 Defendants. *See, e.g., Random House v. Rosetta Books LLC*, 283 F. 3d 490, 491-2
 4 (2d Cir. 2002) (affirming denial of preliminary injunction due to serious concerns that
 5 Rosetta would go out of business balanced against Random House's alleged loss of
 6 goodwill).

7 **V. PUBLIC INTEREST DOES NOT SUPPORT ISSUANCE OF**
 8 **INJUNCTIVE RELIEF**

9 Plaintiffs bear the burden of proof to show that public interest favors issuance
 10 of injunctive relief. *See, e.g., Aurora World, Inc. v. Ty, Inc.*, 719 F. Supp. 2d 1115,
 11 1126 (C.D. Cal. 2009). While Plaintiffs own anticompetitive interest in restricting
 12 competition may be well served by the injunction, the ordinary consumer who merely
 13 wants access to broadcast programming in as many convenient forums as possible is
 14 harmed. The consumer will suffer if an injunction is issued because it would restrict
 15 consumer choice and convenience when viewing free-to-air broadcast television.
 16 Commentators and media advocacy groups have shown a strong interest in protecting
 17 broad and convenient consumer access to media, as reflected in amicus briefing
 18 submitted by the Electronic Frontier Foundation and Public Knowledge in support of
 19 Defendants' opposition to a preliminary injunction motion in the *Aereo* litigation in
 20 New York. (*See* RJN, Ex. B.) Further, there are no allegations that Defendants have
 21 altered or manipulated copyrighted works, which is the type of conduct that may
 22 weigh in the public interest. Rather, the parties here are engaged in a legal debate
 23 over the degree to which third parties can profit from providing the public with a
 24 service they increasingly desire or demand: internet access to media through a remote
 25 DVR. That legal debate extends to the validity and protections afforded in leading
 26 precedents such as the *Cablevision* decision; for that reason, Netcoalition and
 27 Computer & Communications Industry Association filed an amicus brief "in support
 28 of neither party" but setting forth arguments in support of the *Cablevision* Court's

1 reasoning and ruling. (*See* RJN, Ex. C.)

2 One consequence of Plaintiffs' position would be to enforce a monopoly of
 3 licensing or control over their broadcast programming that is otherwise available to
 4 the public under the Copyright Act. Those precise facts have caused federal courts to
 5 weight this factor in favor of the technology innovator over the copyright holder.
 6 *See, e.g., Softman Prods. Co., LLC v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075,
 7 1091 (C.D. Cal. 2001) ("A system of 'licensing' which grants software publishers
 8 this degree of unchecked power to control the market deserves to be the object of
 9 careful scrutiny.").

10 CONCLUSION

11 Based on the foregoing, Defendants respectfully request that the Court deny
 12 Plaintiffs' application for a preliminary injunction.

13
 14 Dated: November 15, 2012

BAKER MARQUART LLP

15
 16 By: /s/ Ryan G. Baker
 17 Ryan G. Baker

18 Attorneys for Defendant Aereokiller
 19 LLC
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